Office-Supreme Court, U.S.
FILED
MAR 14 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-972 and 82-984

In the Supreme Court of the United States

OCTOBER TERM, 1982

HERBERT R. GIBSON, JR., ET AL., PETITIONERS
v.
FEDERAL TRADE COMMISSION

H.R. GIBSON, SR., ET UX., PETITIONERS
v.
FEDERAL TRADE COMMISSION

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners in No. 82-984 waived any right to discovery concerning the possible disqualification of the Administrative Law Judge who presided over their administrative trial.

2. Whether the court of appeals erred in upholding the Commission's determination that petitioner Gibson, Sr. collected dummy brokerage fees in violation of 15 U.S.C. 13(c) (No. 82-984).

3. Whether the Commission properly directed its order prohibiting future violations of 15 U.S.C. 13(c) to petitioners in No. 82-972.

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No. 82-972

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-75a)[1] is reported at 682 F.2d 554. The opinion and order of the Federal Trade Commission (Pet. App. 76a-179a) are reported at 95 F.T.C. 721. The initial decision of the administrative law judge is reported at 95 F.T.C. 553 (1980).

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[1] "Pet. App." references are to the appendix to the petition in No. 82-972.

JURISDICTION

The judgment of the court of appeals (Pet. App. 180a-181a) was entered on August 13, 1982, and a petition for rehearing was denied on September 13, 1982 (Pet. App. 182a). The petition for a writ of certiorari in No. 82-972 was filed on December 10, 1982, and in No. 82-984 on December 13, 1982 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent portions of the Administrative Procedure Act, 5 U.S.C. 554, are set forth in the Appendix, *infra*. Section 2(c) of the Clayton Act, 15 U.S.C. 13(c), is set forth at Pet. App. 184a.

STATEMENT

1. This case involves a cease and desist order issued by the Federal Trade Commission against individuals and corporations comprising a closely-knit family enterprise. In 1958, petitioners in No. 82-984, H. R. Gibson, Sr. and his wife, Belva Gibson, founded a discount chain that eventually encompassed more than 500 retail discount stores operating in 29 states, several corporations providing support services to the retail stores, and the Gibson Trade Show. By 1971, the business accounted for $1.6 billion in retail sales. Pet. App. 3a-6a.

The Gibson retail stores generally are incorporated individually. They include stores owned by Gibson family members as well as stores franchised to operate under the Gibson trade name. Franchisees are charged a monthly franchise fee, receive merchandising advice, and are entitled to participate in the Gibson Trade Show, at which representatives of various suppliers exhibit their products and attempt to obtain orders from individual Gibson owned and franchised stores. Gibson, Sr. employs "merchandise managers" or "trade show buyers" to recruit suppliers to

participate in the show, to discuss product lines, billing terms, and prices with the suppliers, and to negotiate with the suppliers to obtain the best possible deal on the products to be shown. Pet. App. 4a, 6a-9a.

The individual petitioners in No. 82-972 are Herbert R. Gibson, Jr. and Gerald P. Gibson, sons of petitioners in No. 82-984. Before November 1, 1972, they were president and executive vice president of Gibson Products Co., which operated the franchising business and the Gibson Trade Show. Thereafter, they carried on the retailing and franchising business through Gibson's, Inc. and Gibson Discount Centers, Inc., the corporate petitioners in No. 82-972. Pet. App. 5a-6a, 140a, 145a.

In February 1975, the Commission issued an administrative complaint against petitioners. Count I charged them with engaging in "unfair methods of competition," in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by inducing suppliers to pay promotional allowances in connection with their participation in the Gibson Trade Show that were not proportionately available to other customers of those suppliers. Count II charged unfair competition in the form of concerted boycotts of suppliers that did not grant the trade show allowances. Count III alleged payment of brokerage for services not rendered, in violation of Section 2(c) of the Clayton Act, 15 U.S.C. 13(c). Pet. App. 10a-11a. Following a 10-month trial, an Administrative Law Judge (ALJ) issued an initial decision dismissing Count I as against all petitioners, entering an order against all petitioners except Gibson's, Inc. on Count II and entering an order against Gibson, Sr. only on Count III. Pet. App. 12a-13a.

2. Both sides appealed the ALJ's decision to the full Commission. The Commission affirmed the dismissal of Count I and the ALJ's findings of violations as to Counts

II and III, but it modified the terms of the cease and desist order. Pet. App. 76a-179a.

Count III, the illegal brokerage payments charge, concerned payments made to Gibson, Sr. by Barshell, Inc. and Al Cohen Associates, Inc., firms that had successively represented the Ray-O-Vac Division of ESB Incorporated in its sales to the Gibson stores. Barshell and its sole owner, James C. Miller, represented Ray-O-Vac in its dealings with the Gibson stores between 1969 and 1974. Miller testified that, during that time, Gibson, Sr. frequently visited his office in connection with Ray-O-Vac matters and, on such occasions, successfully negotiated for kickbacks to be paid to himself or to the Trade Show based on the amount of Ray-O-Vac's sales to the Gibson stores. Pet. App. 11a-12a, 60a; 95 F.T.C. at 666-669.

Miller's testimony was corroborated by documentary evidence. For example, Commission exhibit 192 was a Barshell check in the amount of $13,173.43 made payable to Gibson, Sr. The Commission agreed with the ALJ that this check, and other similar payments to which Miller testified, constituted the transmittal of brokerage payments from Ray-O-Vac, the seller, to Gibson, Sr., who, as owner and operator of various Gibson retail stores, was a buyer from Ray-O-Vac. Pet. App. 60a-62a, 161a-163a; 95 F.T.C. at 668-669.

The Commission found no evidence to support Gibson, Sr.'s claim that he had rendered services to Barshell that justified the brokerage payments. Pet. App. 165a-169a. Accordingly, it concluded that the payments violated Section 2(c) of the Clayton Act, which makes unlawful the payment of brokerage by a seller to a buyer, except for services rendered in connection with a sale or purchase. On the basis of petitioners' "complete interdependence and common control [of the Gibson operation] during the period of the violations" (Pet. App. 13a), the Commission

extended the ALJ's order remedying the brokerage violations beyond Gibson, Sr. to include other Gibson family members and corporations in order to prevent possible circumvention of the order.[2]

The Commission's decision was issued on April 30, 1980. In June 1980, petitioners sought reconsideration by the Commission, for the first time requesting leave to conduct discovery to determine whether a basis existed for seeking disqualification of the ALJ. In support of their request, petitioners cited *Grolier, Inc.* v. *FTC*, 615 F.2d 1215 (9th Cir. 1980), in which a decision of the Commission had been remanded in order to permit discovery with respect to the possible disqualification of an ALJ based on his prior service as an attorney-adviser. Pet. App. 13a-14a.

The Commission denied petitioners' request for reconsideration. It found that in February 1977 the ALJ had apprised counsel for all parties that he had served as an attorney-adviser to former FTC Commissioner Everette MacIntyre from 1963 through January 1971. Although the Commission's pre-complaint investigation of some aspects of the Gibson case had been pending during this period, the ALJ had advised counsel that he personally could recall nothing crossing his desk concerning the Gibsons. Counsel for petitioners then expressly declined, on the record, to object to the ALJ's continued participation in the case. Pet. App. 20a-21a. The Commission therefore concluded that, unlike the party in *Grolier, Inc.* v. *FTC, supra,* petitioners had not timely sought discovery. To the contrary, they had expressly stated they had no objection to the continued participation of the ALJ, and had requested discovery only three years later, after waiting to observe the final outcome of their case.

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[2]The Commission also extended the order under Count II to apply to Gibson's, Inc. Pet. App. 143a-146a.

3. The court of appeals affirmed. Pet. App. 1a-75a. It first held (*id.* at 33a-49a) that petitioners' request for discovery concerning the ALJ's possible disqualification was untimely, any objection having been waived. It next ruled that substantial evidence supported the Commission's findings concerning the boycotts charged in Count II (Pet. App. 49a-59a) and the illegal brokerage payments charged in Count III (Pet. App. 59a-70a). Finally, it held (*id.* at 70a-75a) that the cease and desist order had properly been extended to all Gibson family members and corporations because the substantial interrelationships and business overlaps revealed in the record demonstrated a reasonable relationship between the need to prevent further violations and the remedy chosen by the Commission.

ARGUMENT

The issues raised by the petitions were thoroughly explored and correctly resolved by both the Commission and the court of appeals. The decision below presents no conflict with any decision of this Court or any other court of appeals. Further review therefore is not necessary.

1. There is no merit to the continued challenge by petitioners in No. 82-984 to the Commission's refusal to permit discovery to determine whether there was any basis to seek disqualification of the ALJ. Even if they might have been entitled to conduct such discovery in 1977, when the ALJ disclosed his former status as an aide to a Commissioner, it is clear that petitioners waived any such right both expressly and by their failure to seek discovery in a timely manner.

The Administrative Procedure Act, 5 U.S.C. 554(d), provides that an employee who performs an "investigative or prosecuting" function for an agency may not in that or a factually related case "participate or advise in the decision"

of the case.[3] In *Grolier, Inc.* v. *FTC, supra,* the court of appeals construed this provision to mean that an attorney-adviser to a Commissioner may not subsequently serve as an administrative law judge in a case with which, while an attorney-adviser, he was "sufficiently involved * * * to be apprised of *ex parte* information." 615 F.2d at 1221. The court remanded the case for reconsideration of Grolier's request for discovery and, in view of the results of that reconsideration, the merits of its disqualification motion.

Assuming arguendo that *Grolier* was correctly decided,[4] it holds, at most, that a *timely* request for discovery bearing on an ALJ's disqualifiction cannot be denied where there is a basis for questioning whether he previously was involved in the investigation or prosecution of the same or a related case.[5] Here, however, petitioners failed to make a timely request for disqualification or discovery. Rather, after being apprised of the ALJ's former status, they expressly stated that they did not wish to challenge his participation

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[3]Subsection 554(d)(C) makes clear that the disqualification does not apply "to the agency or a member or members of the body comprising the agency."

[4]The suggestion in *Grolier, supra,* 615 F.2d at 1220, that any prior exposure of an agency employee to evidentiary facts renders him "engaged in the performance of investigative or prosecuting functions" (5 U.S.C. 554(d)) has been criticized as threatening serious interference with the performance by the agency staff of its advisory functions. Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies,* 81 Colum. L. Rev. 759, 771 (1981).

[5]Immediately upon learning of the ALJ's prior service as an attorney-adviser to a Commissioner, Grolier requested him to disqualify himself from further participation in the proceedings. When the ALJ refused, Grolier filed a formal motion with the Commission seeking disqualification and removal of the ALJ and at the same time requesting discovery of specified FTC records it claimed would have tended to show the nature and extent of the ALJ's contact with Grolier's case.

in their case. Only after awaiting the outcomes of both their hearing before the ALJ and their appeal to the Commission did petitioners — three years later — request discovery relating to the ALJ's possible disqualification. Pet. App. 20a-22a. In these circumstances, the court of appeals correctly concluded (*id.* at 32a-34a) that petitioners had waived any objection to the ALJ's participation in their case.

The court below is the third court of appeals to hold (Pet. App. 37a-47a) that challenges to an administrative decision-maker's participation in a case under 5 U.S.C. 554(d) are waivable. See *International Paper Co.* v. *FPC*, 438 F.2d 1349, 1357-1358 (2d Cir.), cert. denied, 404 U.S. 827 (1971); *Democrat Printing Co.* v. *FCC*, 202 F.2d 298, 305 (D.C. Cir. 1952). See also *Marcus* v. *Director, Office of Workers' Compensation Programs*, 548 F.2d 1044, 1051 (D.C. Cir. 1976); *Duffield* v. *Charleston Area Medical Center, Inc.*, 503 F.2d 512, 515-517 (4th Cir. 1974); cf. *United States* v. *L.A. Tucker Truck Lines*, 344 U.S. 33 (1952). No court has held to the contrary.

Petitioners contend (82-984 Pet. 27-30) that their waiver was not "meaningful" since, prior to the Ninth Circuit's decision in *Grolier, supra*, it was the Commission's settled position that the exemption to the prohibitions of 5 U.S.C. 554(d) applicable to the Commissioners themselves (see note 3, *supra*) also applied to legal advisers to the Commissioners and that, therefore, any objection on their part to the ALJ's participation would have been futile. The Court rejected this same argument in *United States* v. *L.A. Tucker Truck Lines, supra*, 344 U.S. at 37 (footnote omitted):

> It is urged in this case that the [Interstate Commerce] Commission had a predetermined policy on this subject which would have required it to overrule the objection if made. While this may well be true, the Commission is obliged to deal with a large number of like cases.

> Repetition of the objection in them might lead to a change of policy, or, if it did not, the Commission would at least be put on notice of the accumulating risk of wholesale reversals being incurred by its persistence. Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.

Moreover, petitioners here not only failed to object to the ALJ's continued participation in their case, but, when the point was raised by the ALJ himself, they affirmatively waived any objection on the record. Pet. App. 21a. Hence, as the court of appeals observed (*id.* at 35a), petitioners "are in no position to argue that a challenge to the ALJ's participation would have been fruitless."

In any event, as the court below concluded (Pet. App. 47a), "there is simply no indication of any manifest injustice or prejudice to the Gibsons from the participation of [the ALJ in their case]." The court explained (*id.* at 48a):

> The lack of prejudice seems clear from the fact that the transactions forming the basis for liability challenged here occurred after [the ALJ] left the service of Commissioner MacIntyre. The only charge that could possibly rely on ex parte information, that in Count I, was dismissed by the ALJ. Nor have the Gibsons provided or even suggested the existence of any evidence that [the ALJ] either possessed or relied on ex parte information.

2.a. The claim of petitioners in No. 82-984 (Pet. 14-23) that, in the absence of proof of discrimination, no illegal brokerage, within the meaning of Section 2(c) of the Clayton Act, 15 U.S.C. 13(c), was established also is without

merit. The language of Section 2(c) is absolute in prohibiting the payment or receipt of brokerage between parties to a transaction or their agents "except for services rendered" (15 U.S.C. 13(c)).[6] Moreover, one of the practices against which Section 2(c) was specifically directed was that which was proved here: the payment of "dummy brokerage" by a seller (Ray-O-Vac) to a broker (Barshell) who in fact is under the control of, and passing his commission on to, the buyer (Gibson). See page 4, *supra*. As the Court observed in *FTC* v. *Henry Broch & Co.*, 363 U.S. 166, 169 (1960):

> One of the favorite means of obtaining an indirect price concession was by setting up "dummy" brokers who were employed by the buyer and who, in many cases, rendered no services. The large buyers demanded that the seller pay "brokerage" to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of § 2(c) of the Act.

See also *FTC* v. *Simplicity Pattern Co.*, 360 U.S. 55, 65 (1959). Section 2(c) thus renders the payment of "kickbacks" or "dummy brokerage" unlawful regardless of whether similar payments are being made to others.[7]

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[6]See H.R. Rep. No. 2951, 74th Cong., 2d Sess. 7 (1936):

> [Section 2(c)] permits the payment of compensation by a seller to his broker or agent for services actually rendered in his behalf; likewise by a buyer to his broker or agent for services in connection with the purchase of goods actually rendered in his behalf; but it prohibits the direct or indirect payment of brokerage except for such services rendered. It prohibits its allowance by the buyer direct to the seller, or by the seller direct to the buyer; and it prohibits its payment by either to an agent or intermediary acting in fact for or in behalf, or subject to the direct or indirect control, of the other.

[7]There was, of course, no suggestion here that Ray-O-Vac or Barshell was making comparable kickback or dummy brokerage payments to other customers.

Petitioners' reliance (82-984 Pet. 14-17, 21-22) on *FTC* v. *Henry Broch & Co., supra,* and *FTC* v. *Henry Broch & Co.*, 368 U.S. 360 (1962), is misplaced. There, an independent broker had agreed to lower his commission in order to give the purchaser a lower price. The issue was whether the differential in price amounted to an "allowance * * * in lieu" of brokerage, in violation of Section 2(c). This Court found that a violation had occurred, analogizing the situation to that of a broker splitting his commission with the buyer. See 363 U.S. at 174-175. The Court was concerned, however, that genuine brokers be allowed to alter their commissions without condemnation of every consequent saving to a buyer as an "allowance * * * in lieu" of brokerage. The Court explained (*id.* at 175-176; emphasis added):

> This is not to say that every reduction in price, coupled with a reduction in brokerage, automatically compels the conclusion that an allowance "in lieu" of brokerage has been granted. As the Commission itself has made clear, *whether such a reduction is tantamount to a discriminatory payment of brokerage depends on the circumstances of each case.*

Petitioners claim (82-984 Pet. 16) support in the underscored language for the proposition that discrimination is a necessary element of proof in Section 2(c) cases. However, because the broker in *Broch* had varied his fee in order to give one customer a price advantage over others, the question whether there could be a Section 2(c) violation in the absence of proof of such discrimination was not before the Court in that case. See Pet. App. 65a.

Moreover, it is plain that in referring to "the discriminatory payment of brokerage," the *Broch* Court did not intend to read into the unequivocal prohibition of Section 2(c) an across-the-board proof requirement not imposed by Congress. Rather, *Broch* simply avoids a construction of

Section 2(c)'s prohibition of allowances "in lieu" of brokerage that might otherwise bar genuinely competitive reductions of fees by brokers. In other words, while "discrimination was used in *Broch* to determine if the price arrangement was an 'in lieu' of brokerage transaction * * *, it does not follow that it is now an essential element in cases involving the outright payment of unearned brokerage." *Rangen, Inc.* v. *Sterling Nelson & Sons*, 351 F.2d 851, 858 (9th Cir. 1965), cert. denied, 383 U.S. 936 (1966). Hence, the court of appeals correctly concluded (Pet. App. 66a) that Section 2(c) "requires no price discrimination in a situation of dummy brokerage such as is involved here." See also *Southgate Brokerage Co.* v. *FTC*, 150 F.2d 607, 609-610 (4th Cir. 1945); *Webb-Crawford Co.* v. *FTC*, 109 F.2d 268, 269 (5th Cir. 1940); cf. *Rangen, Inc.* v. *Sterling Nelson & Sons, supra*, 351 F.2d at 856-858 (commercial bribery actionable under Section 2(c) without proof of price discrimination); *Fitch* v. *Kentucky-Tennessee Light & Power Co.*, 136 F.2d 12, 15-16 (6th Cir. 1943) (same).[8]

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[8]There is no conflict between the decision below and the Fifth Circuit's previous decision in *Thomasville Chair Co.* v. *FTC*, 306 F.2d 541 (1962), on which petitioners rely (82-984 Pet. 14-17, 23). By contrast to the dummy brokerage at issue here, *Thomasville Chair*, like *Broch*, involved the question whether price discounts were being offered "in lieu" of brokerage. In any event, if there is any conflict between the two decisions, it is for the Fifth Circuit to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam).

Petitioners further claim (No. 82-984 Pet. 18-19) that the *Southgate Brokerage Co.* and *Webb-Crawford Co.* decisions, *supra*, were "abandoned as precedent" in *Empire Rayon Yarn Co.* v. *American Viscose Corp.*, 364 F.2d 491 (2d Cir. 1966) (en banc), which adopted Judge Moore's dissent from the decision of the panel in that case, 354 F.2d 182 (1965). But *Empire Rayon Yarn* did not involve the question whether discrimination is an element of a Section 2(c) violation. To the contrary, assuming price discrimination, the question there was whether Section 2(c) applied in the absence of a brokerage relationship. See 354 F.2d at 187, 191-192. Moreover, Judge Moore expressly noted, both in his initial dissent (354 F.2d at 191) and in his subsequent opinion for the en banc court (364 F.2d at 492), that no question of dummy brokerage was involved there.

Petitioners concede (82-984 Pet. 14) that commercial bribery is illegal under Section 2(c) without proof of discrimination. See *Rangan, Inc.* v. *Sterling Nelson & Sons, supra; Fitch* v. *Kentucky-Tennessee Light & Power Co., supra.* The "dummy brokerage" at issue here — the under-the-table payment of brokerage from seller to buyer — is functionally indistinguishable. Hence, no proof of discrimination was necessary to establish a violation of Section 2(c).

b. Petitioners also argue (82-984 Pet. 33-38) that in fact the brokerage payments were not fictitious, but were for actual services rendered. The court of appeals found substantial evidence (Pet. App. 67a-70a) to support the Commission's and the ALJ's findings to the contrary (*id.* at 169a):

> [T]here was no showing here that [Gibson, Sr.] performed any functions that might have entitled him to a discount of measurable size. For example, it was not shown that Gibson, Sr. assumed the credit risk, serviced small unit purchases or maintained and operated a warehouse storing Ray-O-Vac's products. Nor was there evidence that Ray-O-Vac was even aware of his activities. As the ALJ noted, this militates strongly against any finding that the split brokerage constituted a functional discount for distributional services.

This evidentiary issue does not warrant review by this Court. See *American Textile Mfrs. Institute, Inc.* v. *Donovan*, 452 U.S. 490, 523 (1981).

3. The sole claim of petitioners in No. 82-972 (Pet. 5-9) is that they were improperly included in the Commission's order prohibiting the future receipt of illegal brokerage and kickbacks.[9] Petitioners acknowledge (*id.* at 5), however,

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[9]Petitioners in No. 82-972 do not challenge the application to them of the boycott provisions of the Commission's order.

that Commission orders may extend so far as is "reasonably necessary to correct the evil and preserve the rights of competitors and the public," *FTC* v. *Royal Milling Co.*, 288 U.S. 212, 217 (1933), and will be sustained on review if they bear a "reasonable relation to the unlawful practices found to exist," *FTC* v. *National Lead Co.*, 352 U.S. 419, 428 (1957). The decision below fully accords with these principles.

As the court of appeals recognized (Pet. App. 71a-74a), extension of the Commission's order to the parties in No. 82-972 was necessary to prevent circumvention of the prohibition against future violations of Section 2(c). The court agreed (Pet. App. 70a) with the Commission's finding that:

> "The Gibson Products Company, through which Gibson, Sr. conducted the franchising, trade show and brokerage businesses, and the various corporate entities through which the Gibson-owned retail stores were operated were completely interdependent and under the control of the same few individuals in the Gibson family. For purposes of relief in this environment, there is ample justification to bind all Gibson corporate respondents, except dissolved corporations, and all Gibson family respondents in order to insure that the order we issue today is not circumvented."

While petitioners complain of guilt by association, the facts of record reveal that they were far more than passive participants in the Gibson family enterprise that gave rise to the violations found by the Commission. In 1971 and 1972, for example, all of the stock of Gibson, Sr.'s retail stores was held by Gibson Discount Centers, Inc. (95 F.T.C. at 556-557 & n.2), whose officers and directors included the individual petitioners in No. 82-972, Gibson, Jr. and Gerald Gibson, as well as Gibson, Sr. and Belva Gibson (95 F.T.C.

at 705).[10] It was as a buyer for the Gibson stores that Gibson, Sr. received the illegal brokerage payments and it was the purchasing power of those stores that gave Gibson, Sr. the ability to extract dummy brokerage from sellers. In 1972, the ownership of the Gibson stores and the franchising business was transferred to Gibson's, Inc. and the individual petitioners in No. 82-972. See page 3, *supra*. In these circumstances, the Commission properly concluded that application of its order to the successor corporation and to the Gibson sons was the only way to prevent recurrence of the receipt of illegal brokerage by the Gibson stores.

The decision below affirming the Commission's order as to petitioners in No. 82-972 is consistent with the holdings of other courts of appeals that have recognized that where individuals are "transacting an integrated business through a maze of interrelated companies * * * 'the pattern and frame-work of the whole enterprise must be taken into consideration' " in framing an order. *Delaware Watch Co.* v. *FTC*, 332 F.2d 745, 746 (2d Cir. 1964), quoting *Art National Manufacturers Distrib. Co.* v. *FTC*, 298 F.2d 476, 477 (2d Cir. 1962); *Sunshine Art Studios, Inc.* v. *FTC*, 481 F.2d 1171, 1175 (1st Cir. 1973).

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[10]During this period, Gibson, Jr. and Gerald Gibson also were president and executive vice president of Gibson Products Co., under whose aegis the franchising business and Gibson Trade Show were run. See page 3, *supra*.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1983

DOJ-1983-03

APPENDIX

5 U.S.C. 554(d) provides:

> The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not —
>
> (1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or
>
> (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.
>
> An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply —
>
> (A) in determining applications for initial licenses;
>
> (B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
>
> (C) to the agency or a member or members of the body comprising the agency.